Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 02(f)-64–09 OF 2016 (W)
ZULKEFLI PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), AZAHAR MOHAMED, AZIAH ALI AND ALIZATUL KHAIR FCJJ
21 NOVEMBER 2018

Contract — Damages — Liquidated damages — Whether innocent party seeking to enforce damages clause in contract for breach did not have to prove actual loss or damage in every case — Whether s 75 of the Contracts Act 1950 allowed innocent party reasonable compensation whether or not actual loss or damage proven — Whether actual loss not sole determinant of 'reasonable compensation' — Whether reasonable compensation should be determined by taking into account legitimate interests of innocent party and proportionality of sum stated by way of damages vis a vis loss caused to innocent party by breach — Whether party that caused breach had burden of showing that damages clause in the contract unreasonable and should be struck down

The appellant owned a piece of land with plant and machinery thereon ('the properties'). Following the appellant's winding-up, the liquidators decided to sell the properties by open tender and issued an information memorandum ('the IM') containing the terms, conditions and requirements of the tender exercise. Before the exercise could be carried out, the respondent offered to buy the properties for RM90m and submitted a cheque for RM1m as earnest deposit ('ED'). The liquidators accepted the offer and the ED (even though under the terms of the IM the respondent should have paid RM2.6m as ED) and did not proceed with the tender exercise. The liquidators notified the respondent that under the terms of the IM if the respondent failed to sign a sale and purchase agreement ('SPA') for the purchase of the properties within 30 days (whereupon a deposit of 10% of the purchase price was payable), they had the right to cancel the sale and forfeit the RM1m 'as agreed liquidated damages and not by way of penalty'. Before the 30-day deadline approached, the respondent asked for an extension of time of one month to pay the balance of the 10% deposit under the SPA. The liquidators agreed to grant the extension (subject to the same forfeiture warning as before) upon the respondent paying an additional RM500,000 towards the ED. A day before the extended deadline, the respondent requested for a second extension of time which was again granted (subject to the same forfeiture warning) on the respondent's payment of a further RM500,000 towards the ED. Subsequently, when the respondent asked for a third extension of time, the liquidators made it clear that it would be the final extension subject to the respondent paying an

additional RM1m towards the ED and a further RM40,000 as interest calculated at 8%pa on the unpaid balance deposit of RM6m payable upon the signing of the SPA. The liquidators also made it clear that the RM40,000 interest payment was non-refundable and would not be taken into account towards payment of the purchase price for the properties. The liquidators reminded the respondent that if it defaulted in paying the additional RM1m ED and RM40,000 in interest and also failed to execute the SPA and pay the balance RM6m deposit by the final extended deadline, all ED sums paid would be forfeited as agreed liquidated damages pursuant to the terms of the IM. On the date of the final extended deadline, the respondent sent a cheque for RM6m to the appellant together with a request for another extension of time to sign the SPA. The appellant refused the request, terminated the sale, returned the respondent's cheque and informed the respondent that it was forfeiting the total sum of RM3,040,000 that the respondent had paid as ED and interest. The respondent sued the appellant for a declaration that the termination of the sale was wrongful and invalid and sought the return of the forfeited monies or, alternatively, the sum of RM2,040,000 less the first ED sum it had paid. The High Court dismissed the respondent's claim holding that the liquidators were entitled to terminate the sale agreement and forfeit the deposits and interest payment on the respondent's failure to execute the SPA. The court held that the appellant did not have to prove any loss or damage in order to forfeit the deposits as they were true earnest deposits paid towards purchase of the properties and were not penalties and therefore s 75 of the Contracts Act 1950 ('the CA') had no application. The Court of Appeal ('COA') overturned the High Court's decision and ruled that the parties had only agreed to the first payment of RM1m as the ED and only that sum was forfeitable; that since no SPA was signed the respondent was not liable to pay a deposit of RM9m to buy the properties. The COA held that the appellant failed to prove that it had suffered any loss and the forfeited monies were not a genuine pre-estimate of loss or reasonable compensation as required under s 75 of the CA. In the instant appeal against the COA's decision, the appellant argued, inter alia, that the forfeited sum was a reasonable amount as it constituted only 3.3% of the purchase price for the properties and therefore could not be regarded as a penalty. The respondent, however, maintained that the forfeited monies were penalties imposed for not paying the balance of the 10% deposit under the SPA on time. The respondent also said the appellant never proved that it had suffered any loss and there was no basis for it to impose the RM40,000 interest payment.

Held, allowing the appeal, setting aside the decision of the COA and reinstating the decision of the High Court but for different reasons:

(1) There was no necessity for proof of actual loss or damage in every case where an innocent party sought to enforce a damages clause in a contract.

Section 75 of the Contracts Act 1950 ('the CA') allowed reasonable compensation to be awarded by the court irrespective of whether actual loss or damage was proven. *Selva Kumar Murugiah v Thiagarajah Retnasamy* [1995] 1 MLJ 817 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 (both decisions of the Federal Court) should not be interpreted (as what subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss was the sole conclusive determinant of reasonable compensation. Reasonable compensation was not confined to actual loss, although evidence of that might be a useful starting point. In determining what amounted to 'reasonable compensation' under s 75 of the CA, the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 were relevant (see paras 65 & 74).

(2) Regardless of whether the damage was quantifiable or not, it was incumbent upon the court to adopt a common-sense approach by taking into account the legitimate interest which an innocent party might have and the proportionality of a damages clause in determining reasonable compensation. This meant that in a straightforward case, reasonable compensation could be deduced by comparing the amount that was payable on breach with the loss that might be sustained if indeed the breach had occurred. Thus, to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which was likely to be suffered by the innocent party (see para 68).

(3) In the instant case, the correspondence between the parties disclosed that the additional sums totalling RM2.04m were paid by the respondent in return for the appellant extending the time for the respondent to execute the SPA and that upon execution of the SPA the said payments would go towards part payment of the total earnest deposit of RM9m for the purchase of the properties. The additional payments, thus, bore the characteristics of a deposit which was subject to the same test of reasonableness under the law applicable to damages clause under s 75 of the CA (see paras 76, 81 & 89).

(4) The parties were well aware that if the respondent defaulted in executing the SPA, the earnest deposit payments it had made would be forfeited as agreed liquidated damages. On each occasion when an extension of time was granted, the appellant repeatedly warned that failure to execute the SPA would result in forfeiture of the amounts paid as 'agreed liquidated damages and not by way of penalty'. Both parties had the benefit of legal representation and the respondent made no objection to the imposition of the conditions by the appellant. Accordingly, the respondent's conduct was strong evidence of its agreement that the additional payments of

RM2m would form part of the earnest deposit guaranteeing its execution of the SPA and which would eventually be counted towards payment of the total earnest deposit of RM9m (see paras 79–81).

(5) In considering the proportionality of the additional RM2m paid as ED, the said sum was not too large a figure when compared against the RM90m purchase price for the properties. Combined with the initial earnest deposit of RM1m (which the respondent did not contest), the additional RM2m represented only 3.33% of the purchase price for the properties (see para 87).

(6) Once an innocent party seeking to enforce a damages clause under s 75 of the CA had established that there was a breach of contract and that the contract specified a sum to be paid upon breach, the innocent party was entitled to receive a sum not exceeding the amount specified irrespective of whether actual damage or loss was proven subject always to the defaulting party proving that the damages clause, including the sum stated therein, if any, was unreasonable. In the instant case, the respondent failed to discharge its burden of proving that the forfeiture of the additional RM2m was excessive, exorbitant or unreasonable. Consequently, the forfeiture of the additional RM2m amounted to reasonable compensation. To insist that the innocent party had the burden of proving than an impugned clause was not excessive would undermine the purpose of having a damages clause in a contract, which was to promote business efficacy and minimise litigation between the parties (see paras 73–74 & 88).

(7) The appellant had legitimate interests to safeguard. The liquidator had a duty to realise the assets of the appellant expeditiously and at the best possible price to maximise the amount available to the creditors of the company and, in that regard, it was not unreasonable to require some form of guarantee from potential bidders to show that they meant business. The deprivation of the appellant's chance to sell the properties to a third party in addition to its goal of securing the execution of the SPA and avoiding delay in completion were all legitimate interests which the forfeited payments were intended to safeguard. The facts showed that the appellant had declined a proposal from UTeM Holdings to buy the properties for RM135m on the basis that it had a deal with the respondent. The respondent's delay in completing the sale and the subsequent cancellation of the sale financially impacted the appellant by way of lost opportunity, depreciation of its assets and increased expenditure (see paras 83–87).

(8) The parties had agreed to the payment of the RM40,000 as interest charged for the respondent's delay in paying the balance of the earnest deposit of RM6m. The parties agreed that the sum was non-refundable

A regardless of whether or not the sale went through and regardless of any breach. It thus fell outside the scope of s 75 of the CA (see paras 90–91).

[Bahasa Malaysia summary

B Perayu memiliki sebidang tanah dengan loji dan jentera di atasnya ('hartanah'). Berikutan penggulungan perayu, pelikuidasi memutuskan untuk menjual hartanah itu dengan tender terbuka dan mengeluarkan memorandum maklumat ('MM') yang mengandungi terma, syarat dan keperluan pelaksanaan tender. Sebelum pelaksanaan dijalankan, responden menawarkan untuk membeli hartanah itu untuk RM90 juta dan mengemukakan cek C sebanyak RM1 juta sebagai deposit ('deposit'). Pelikuidasi menerima tawaran dan deposit' tersebut (meskipun di bawah terma MM responden sepatutnya membayar RM2.6 juta sebagai deposit') dan tidak meneruskan pelaksanaan tender itu. Peikuidasi memberitahu responden bahawa di bawah terma MM jika responden gagal untuk menandatangani perjanjian jual beli ('PJB') untuk D pembelian hartanah itu dalam tempoh 30 hari (yang mana deposit 10% daripada harga pembelian kena dibayar), mereka mempunyai hak untuk membatalkan jualan itu dan merampas RM1 juta itu 'as agreed liquidated damages and not by way of penalty'. Sebelum tarikh luput 30-hari itu, responden telah memohon lanjutan masa selama satu bulan untuk membayar E deposit 10% itu di bawah PJB tersebut. Pelikuidasi bersetuju untuk memberikan lanjutan itu (tertakluk kepada amaran rampasan yang sama sepertimana sebelumnya) selepas responden membayar tambahan RM500,000 kepada deposit' itu. Sehari sebelum tarikh luput lanjutan itu, responden memohon untuk lanjutan masa kedua yang sekali lagi diberikan F (tertakluk kepada amaran rampasan hak yang sama) ke atas bayaran responden untuk RM500,000 selanjutnya kepada deposit' itu. Berikutan itu, apabila responden memohon untuk lanjutan masa ketiga, pelikuidasi menyatakan dengan jelas bahawa ia adalah lanjutan terakhir tertakluk kepada responden membayar tambahan RM1 juta kepada deposit' itu dan RM40,000 lagi sebagai G faedah yang dikira pada 8% setiap tahun ke atas baki deposit yang belum dibayar daripada RM6 juta yang kena dibayar setelah PJB ditandatangani. Pelikuidasi juga menyatakan dengan jelas bahawa bayaran faedah RM40,000 itu tidak boleh dibayar balik dan tidak akan diambil kira terhadap bayaran harga pembelian untuk hartanah itu. Pelikuidasi mengingatkan responden H bahawa jika ia gagal membayar tambahan RM1 juta deposit' dan faedah RM40,000 dah juga gagal melaksanakan PJB itu dan membayar baki deposit RM6 juta pada tarikh akhir lanjutan terakhir itu, kesemua jumlah deposit' yang telah dibayar akan dirampas sebagai ganti rugi jumlah tertentu yang dipersetujui menurut terma MM itu. Pada tarikh akhir lanjutan terakhir itu, I responden telah menghantar cek RM6 juta kepada perayu bersama permohonan untuk satu lagi lanjutan masa untuk menandatangani PJB tersebut. Perayu menolak permohonan itu, menamatkan jualan itu, memulangkan cek responden dan memberitahu responden bahawa ia akan merampas keseluruhan jumlah RM3,040,000 yang telah dibayar oleh

responden sebagai deposit' dan faedah. Responden telah menyaman perayu untuk satu deklarasi bahawa penamatan jualan itu adalah salah dan tidak sah dan memohon wang yang dirampas dikembalikan atau, secara alternatif, jumlah RM2,040,000 yang kurang daripada deposit' pertama yang telah dibayar olehnya. Mahkamah Tinggi telah menolak tuntutan responden dan memutuskan bahawa peikuidasi berhak untuk menamatkan perjanjian jualan itu dan merampas bayaran deposit dan faedah ke atas kegagalan responden untuk melaksanakan PJB tersebut. Mahkamah memutuskan bahawa perayu tidak perlu membuktikan apa-apa kehilangan atau kerugian bagi tujuan merampas deposit itu kerana ia adalah deposit yang bersungguh-sungguh sebenar dibayar untuk pembelian hartanah itu dan bukan penalti dan oleh itu s 75 Akta Kontrak 1950 ('AK') adalah tidak terpakai. Mahkamah Rayuan ('MR') mengakas keputusan Mahkamah Tinggi dan memutuskan bahawa pihak-pihak hanya bersetuju kepada bayaran pertama RM1 juta itu kerana deposit' itu dan hanya jumlah tersebut boleh dirampas; dan oleh kerana tiada PJB ditandatangani responden tidak bertanggungjawab untuk membayar deposit RM9 juta untuk membeli hartanah tersebut. MR memutuskan bahawa perayu telah gagal membuktikan bahawa ia mengalami apa-apa kerugian dan wang yang dirampas bukan prasangka kerugian sebenar atau pampasan yang munasabah sebagaimana dikehendaki di bawah s 75 AK. Dalam rayuan ini terhadap keputusan MR, perayu berhujah, antara lain, bahawa jumlah yang dirampas adalah jumlah yang munasabah kerana ia merupakan hanya 3.3% daripada harga belian hartanah tersebut dan oleh demikian tidak boleh dianggap sebagai penalti. Responden, bagaimanapun, menegaskan bahawa wang yang dirampas adalah penalti yang dikenakan kerana tidak membayar baki deposit 10% di bawah PJB tersebut menurut masa. Responden juga menyatakan perayu tidak pernah membuktikan bahawa ia telah mengalami apa-apa kerugian dan tiada asas untuknya mengenaan bayaran faedah RM40,000.

Diputuskan, membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan semula keputusan Mahkamah Tinggi tetapi untuk sebab berbeza:

(1) Tiada keperluan untuk bukti sebenar kehilangan atau kerugian dalam setiap kes di mana suatu pihak yang tidak bersalah memohon untuk menguatkuasakan fasal ganti rugi dalam suatu kontrak. Seksyen 75 Akta Kontrak 1950 ('AK') membenarkan pampasan munasabah untuk diawardkan oleh mahkamah tanpa mengira sama ada kehilangan atau kerugian sebenar telah dibuktikan. *Selva Kumar Murugiah v Thiagarajah Retnasamy* [1995] 1 MLJ 817 dan *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 (kedua-dua keputusan Mahkamah Persekutuan) tidak patut ditafsirkan (sebagaimana keputusan berikutnya telahpun melakukannya) sebagai mengenakan perundangan ketat di mana bukti kerugian sebenar adalah satu-satunya

penentu konklusif pampasan yang munsabah. Pampasan yang munasabah tidak terhad kepada kerugian sebenar, meskipun keterangan tersebut mungkin berguna sebagai pemula. Dalam menentukan apa yang merupakan 'reasonable compensation' di bawah s 75 AK, konsep 'legitimate interest' dan 'proportionality' sebagaimana dinyatakan dalam kes *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 adalah relevan (lihat perenggan 65 & 74).

(2) Tanpa mengira sama ada ganti rugi itu boleh dikira atau tidak, ia adalah penting untuk mahkamah menggunakan pendekatan akal fikiran dengan mengambil kira kepentingan sah pihak yang tidak bersalah mungkin ada dan pembahagian fasal ganti rugi dalam menentukan pampasan yang munasabah. Ini bermaksud bahawa dalam kes mudah, pampasan yang munasabah boleh disimpulkan dengan membandingkan jumlah yang kena dibayar kerana pelanggaran dengan kerugian yang mungkin dialami jika pelanggaran sebenarnya berlaku. Oleh itu, untuk tiba kepada pampasan yang munasabah, tidak perlu ada perbezaan ketara antara tahap ganti rugi yang dinyatakan dalam kontrak dan tahap kehilangan atau kerugian yang mungkin dialami oleh pihak yang tidak bersalah (lihat perenggan 68).

(3) Dalam kes ini, hubungan antara pihak-pihak menunjukkan bahawa jumlah tambahan sebanyak RM2.04 juta telah dibayar oleh responden sebagai balasan untuk perayu melanjutkan masa bagi responden melaksanakan PJB tersebut dan selepas pelaksanaan PJB itu bayaran tersebut akan menjadi sebahagian daripada bayaran deposit yang bersungguh-sungguh sebanyak RM9 juta untuk belian hartanah. Bayaran tambahan tersebut, dengan itu, mempunyai ciri-ciri suatu deposit yang tertakluk kepada ujian kemunasabahan yang sama di bawah undang-undang yang boleh terpakai kepada fasal ganti rugi di bawah s 75 AK (lihat perenggan 76, 81 & 89).

(4) Pihak-pihak menyedari bahawa jika respoden gagal melaksanakan PJB itu, bayaran deposit bersungguh-sungguh yang telah dibuatnya akan dirampas sebagai ganti rugi jumlah tertentu yang dipersetujui pada setiap kejadian apabila lanjutan masa diberikan, perayu berulang kali memberi amaran bahawa kegagaln untuk melaksanakan PJB tersebut akan mengakibatkan rampasan jumlah yang telah dibayar sebagai 'agreed liquidated damages and not by way of penalty'. Kedua-dua pihak mempunyai manfaat wakil undang-undang dan responden tidak membuat bantahan terhadap syarat-syarat yang dikenakan oleh perayu. Oleh demikian, perbuatan responden adalah keterangan yang kukuh berhubung persetujuannya bbahawa bayaran tambahan RM2 juta itu akan akhirnya dikira untuk bayaran deposit yang bersungguh-sungguh bagi menjamin pelaksanaan PJB tersebut dan akhirnya dikira sebagai

bayaran untuk keseluruhan deposit bersungguh-sungguh RM9 juta (lihat perenggan 79–81). A

(5) Dalam mempertimbangkan perkadaran tambahan RM2 juta yang dibayar sebagai deposit', jumlah tersebut tidak terlalu besar jika dibandingkan dengan RM90 juta harga belian untuk hartanah itu. Gabungan deposit bersungguh-sungguh yang mula-mula sebanyak RM1 juta (yang tidak dibicarakan oleh responden), tambahan RM2 juta itu mewakili hanya 3.33% harga belian untuk hartanah itu (lihat perenggan 87). B

(6) Setelah pihak yang tidak bersalah yang memohon untuk menguatkuasakan fasal ganti rugi di bawah s 75 AK telah dibuktikan bahawa terdapat pelanggaran kontrak dan bahawa kontrak itu menyatakan secara spesifik suatu jumlah yang kena dibayar untuk pelanggaran, pihak yang tidak bersalah itu berhak untuk menerima jumlah tidak melebihi jumlah yang dinyatakan secara khusus tanpa mengira sama ada kerugian atau kehilangan sebenar telah dibuktikan tertakluk sentiasa kepada pihak yang gagal membuktikan bahawa fasal ganti rugi, termasuk jumlah yang dinyatakan, jika ada, adalah tidak munasabah. Dalam kes ini, responden telah gagal untuk melepaskan bebannya membuktikan bahawa pelucutan hak tambahan RM2 juta adalah melampau, terlalu tinggi atau tidak munasabah. Akibatnya, pelucutan hak tambahan RM2 juta itu merupakan pampasan yang munasabah. Untuk berkeras mengatakan bahawa pihak yang tidak bersalah mempunyai beban membuktikan fasal yang dipersoalkan adalah tidak melampau akan menjejaskan tujuan mempunyai fasal ganti rugi dalam suatu kontrak, yang mana adalah untuk menggalakkan keberkesanan perniagaan dan mengurangkan litigasi antara pihak-pihak (lihat perenggan 73–74 & 88). C D E F

(7) Perayu mempunyai kepentingan sah untuk dilindungi. Pelikuidasi mempunyai kewajipan untuk merealisasikan aset perayu dengan segera dan pada harga yang paling baik untuk memaksimumkan jumlah yang tersedia kepada pemiutang syarikat dan, berkenaan itu, ia bukanlah tidak munasabah untuk memerlukan satu bentuk jaminan daripada pembida yang berpotensi untuk menunjukkan bahawa mereka serius. Peluang yang perayu terkilan untuk menjual hartanah itu kepada pihak ketiga selain matlamatnya untuk menjamin pelaksanaan PJB itu dan mengelakkan lewat siap adalah semua kepentingan sah yang mana bayaran yang dirampas yang bertujuan untuk dilindungi. Fakta menunjukkan bahawa perayu telah menolak tawaran daripada UTeM Holdings untuk membayar hartanah bagi RM135 juta atas dasar ia telah berurusan dengan responden. Kelewatan responden melengkapkan jualan dan berikutan pembatalan jualan secara kewangan menjejaskan perayu melalui peluang yang hilang, penurunan aset dan peningkatan G H I

perbelanjaan (lihat perenggan 83–87).

(8) Pihak-pihak telah bersetuju dengan bayaran RM40,000 sebagai faedah yang dikenakan untuk kelewatan responden membayar baki deposit yang bersungguh-sungguh sebanyak RM6 juta itu. Pihak-pihak bersetuju bahawa jumlah itu tidak boleh dikembalikan tidak kira sama ada jualan berjaya dan tidak kira ada pelanggaran. Ia dengan itu terjatuh di luar skop s 75 AK (lihat perenggan 90–91).]

Notes

For cases on liquidated damages, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 5026–5058.

Cases referred to

A Muthu Krishna Iyer v Sankaralingam Pillai (1913) ILR 36 MAD 229 (refd)
Amble Assets LLP (in administration) and another v Longbenton Foods Ltd (in administration) [2011] EWHC 1943 (Ch), Ch D (refd)
Bhai Panna Singh v Bhai Arjun Singh AIR 1929 PC 179, PC (refd)
Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67, SC (refd)
Dies v British and International Mining and Finance Corpn Ltd [1939] 1 KB 724, KBD (refd)
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79, HL (refd)
Fateh Chand v Balkishan Das 1963 AIR 1405, SC (refd)
Hadley v Baxendale (1854) 9 Exch 341 (refd)
Hinton v Sparkes (1868) LR 3 CP 161 (refd)
Howe v Smith (1884) 27 Ch D 89, CA (refd)
Jagdishpur Metal Industries and Ors v Vijoy Oil Industries Ltd AIR 1959 Pat 176, HC (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (refd)
Kailash Nath Associates v Delhi Development Authority (2015) 4 SCC 136, SC (refd)
(Kunwar) Chiranjit Singh v Har Swarup AIR 1926 PC 1, PC (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (refd)
Lock v Bell [1931] 1 Ch 35, Ch D (refd)
Manian Patter v Madras Railway Company (1906) ILR 19 Mad 188, HC (refd)
Maula Bux v Union of India (1970) 2 MLJ 61, SC (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)
Natesa Aiyar And Anr vs Appavu Padayachi And Anr (1915) ILR 38 Mad 178, HC (refd)

Office of Fair Trading v Abbey National plc and others [2009] UKSC 6; [2010] 1 AC 696, SC (refd)
ParkingEye Ltd v Beavis [2015] UKSC 67, SC (refd)
Philips (Hong Kong) Ltd v The Attorney General of Hong Kong (1993) 61 BLR 49; [1993] UKPC 3, PC (refd)
Satish Batra v Sudhir Rawal (2013) 1 SCC 345, HC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, CA (refd)
Singer Manufacturing Company v Raja Prosad (1909) ILR 36 Cal 960, HC (refd)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711, SC (refd)
UK Housing Alliance (North West) Ltd v Francis [2010] 3 All ER 519, CA (refd)
WJ Younie and Ors v Tulsiram Jankiram and Ors AIR 1942 Cal 382, HC (refd)
Wallis v Smith (1882) 21 Ch D 243, CA (refd)
Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573, PC (refd)

Legislation referred to

Contracts Act 1950 ss 74(r), 75
Courts of Judicature Act 1964 s 78
Indian Contract Act 1872 [IND] s 74

Appeal from: Civil Appeal No W-02(NCC)(W)-563–04 of 2015 (Court of Appeal, Putrajaya)

Lim Chee Wee (Wong Chee Lin and Iris Tang Shu Ni with him) (Skrine) for the appellant.
Ravindran Nekoo (Moganambal Murugappan with him) (Hakem Arabi & Assoc) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] On 23 August 2016 this court granted leave to appeal on the following questions:

(a) where, in a sale and purchase of property, where terms and conditions of the sale and purchase agreement ('SPA') have been agreed and a date is fixed for the execution of the SPA, whether any additional deposit paid for the extension of time for completion is equally subject to forfeiture; and

(b) whether a purchaser who has agreed and willingly paid an interest in consideration of an extension of time be entitled to claim a refund of the same in the event he defaults in executing the SPA and paying the balance deposit on the due date.

[2] In this judgment unless otherwise stated the parties are referred to as they were at the first instance court, namely the appellant as the defendant and the respondent as the plaintiff. The defendant was the first defendant while OCBC Bank (M) Bhd was the second defendant at the commencement of the trial. The claim against the second defendant was discontinued just before the commencement of the trial at the first instance. The defendant was wound up on 25 July 2011 and liquidators were appointed to manage its affairs. As such reference to acts of the defendant after being wound up were that of the liquidators.

[3] As the then President of the Court of Appeal who presided over this appeal has since retired we are delivering this Judgment in reliance upon s 78 of the Courts of Judicature Act 1964. This is a unanimous decision by the remaining members of the panel who heard this appeal.

[4] The defendant was the owner of a piece of land in Mukim Bukit Katil, Melaka ('the land') together with the plant and machinery ('the machineries') on the land. The land and the machineries are herein collectively referred to as 'the properties'. Following the winding up of the defendant the properties were put up for sale by way of an open tender exercise.

[5] However, before the exercise could be carried out the plaintiff made an offer to purchase the properties for RM90m being RM80m for the land and RM10m for the machineries. The plaintiff did so vide a letter dated 6 October 2011 with a tender form duly completed in compliance with the requirements contained in the Information Memorandum issued by the defendant.

[6] According to cl 2.5.1 of the information memorandum:

(a) all offers for the property must be accompanied by a sum equivalent to 2% of the offer price ('ED'). The offer price shall be in Ringgit Malaysia ('RM'); and

(b) all offers for the machinery must be accompanied by a sum equivalent to 10% of the offer price ('ED'). The offer price shall be in Ringgit Malaysia ('RM').

[7] It should be noted that the tender form was varied from the original version when submitted so as to reflect the fact that the plaintiff was offering an earnest deposit amount of RM1m instead of 2% of the tender price for the land

(RM1.6m) and 10% of the tender price of the machineries (RM1m). However, the accompanying letter dated 6 October 2011 was clear when it stated that the offer was submitted together with 'Earnest Deposit Ringgit Malaysia One Million (RM1m) as part of the Earnest Deposit'.

[8] On 3 October 2011, the plaintiff paid the sum of RM1m as the earnest deposit ('the first earnest deposit'). The liquidators accepted the plaintiff's offer and did not proceed with the tender exercise.

[9] The acceptance of the plaintiff's offer was subject to the terms contained in the information memorandum dated 15 September 2011 which provided that the sale and purchase agreement ('the SPA') must be executed within 30 days from 7 October 2011 (ie it must be signed by 6 November 2011) failing which the earnest deposit of RM1m paid by the plaintiff would be forfeited as agreed liquidated damages and not by way of penalty. According to para 3 of the defendant's letter of acceptance dated 7 October 2011:

> Please be informed that pursuant to Clause 2.6 of the Info Memo, a Sale and Purchase Agreement ('SPA') must be executed within 30 days from the date of this Letter of Acceptance unless otherwise extended by the Liquidators, failing which, your part earnest deposit paid of RM1.0 million will be forfeited as agreed liquidated damages and not by way of penalty pursuant to Clause 2.5.3 of the Info Memo.

[10] The plaintiff did not execute the SPA by 6 November 2011. The plaintiff requested for, and was given, an extension of time until 23 November 2011 by the liquidators ('the first extension'). In return, the plaintiff had to pay a further earnest deposit sum of RM1m that was subsequently reduced to RM500,000. The plaintiff was also cautioned that in the event it failed to comply with the deadline for execution of the SPA, the earnest deposit sum received by the defendant from the plaintiff thus far would be forfeited as agreed liquidated damages and not by way of penalty.

[11] On 22 November 2011, the plaintiff wrote to the liquidators requesting for another extension ('second extension'). The plaintiff's letter was worded thus:

> Dear Sir,
>
> APPEAL TO EXTEND PAYMENT OF BALANCE DEPOSIT RM SEVEN MILLION FIVE HUNDRED THOUSAND (RM7,500,000) FOR THE OFFER TO PUCHASE LAND & BUILDING (L&B) AND PLANT AND MACHINERIES (P&M) OF CUBIC ELECTRONICS SDN BHD (IN LIQUIDATION)
>
> Referring to the above, we would like to request a new date to pay the balance deposit RM7,500,000, supposed to be on the 23rd November 2011. Our new date

to pay the Deposit is on the 23rd December 2011.

We shall pay additional Earnest Deposit as part of Deposit, Ringgit Malaysia Five Hundred Thousand (RM500,000.00) by 29th November 2011. Therefore, please accept our request; as we are very serious and committed to purchase this Land & Building and Plant and machineries.

We highly appreciated your help and cooperation since beginning and looking forward for your favourable reply.

Thank you.

[12] The plaintiff's second extension request was granted on condition that a further earnest deposit sum of RM500,000 be paid to the defendant. Again, the plaintiff was cautioned by the defendant that default in complying with the deadline for execution of the SPA would result in the earnest deposit amount received by the defendant from the plaintiff as at the date of the plaintiff's default being forfeited as agreed liquidated damages and not by way of penalty. The RM500,000 was paid by the plaintiff on 28 November 2011.

[13] On 21 December 2011, the plaintiff wrote to the defendant for a third extension of time. For ease of reference we reproduce the plaintiff's letter to the defendant:

Dear Sir,

OFFER TO PURCHASE LAND & BUILDING (L&B) AND PLANT & MACHINERIES (P&M) OF CUBIC ELECTRONICS SDN BHD (IN LIQUIDATION)

We are appealing to postpone our payment of the balance deposit RM7 million to 23rd January 2012. However as a commitment, we will pay RM1,000,000 on 23rd December 2011. The reason is due to, by end of the year bank and funder doing their closing account-process, which they can only come out with the RM6,000,000 by January 2012. We seek for your understanding because we believe you understand end of the year situation.

Again we are committed to pay the balance deposit, because we want to success [sic] in this acquisition without losing our investment. We hope and pray for your kind consideration on our appeal. We appreciate your cooperation and looking forward your soonest favourable reply.

[14] The defendant agreed to grant the plaintiff a third extension of time until 23 January 2012 but subject to payment of a further earnest deposit sum of RM1m plus interest of RM40,000 due to the delay in making the earlier payment. The letter by the defendant is as follows:

Dear Sirs

Sale and Purchase Agreement

Property : PM2895, Lot 16658, Mukim Bukit Katil, District of Melaka Tengah, State of Melaka

Assets: Machinery set out in Part V of the Information Memorandum dated 15 September 2011

Vendor : Cubic Electronics Sdn Bhd (In Liquidation)

Purchaser: Mars Telecommunication Sdn Bhd

We refer to your letter dated 21 December 2011.

We have been instructed by the Vendor to inform you that the Vendor request that the deadline for the Purchaser to execute and return the agreements for the purchase of the Property and the Assets to us together with the relevant payment and documents to be extended to 23 January 2012 (which is a public holiday and as such, the said documents must be returned to us latest by the last Business Day preceding thereto ie 20 January 2012*)*

PROVIDED THAT:

(i) a further earnest deposit sum of RM1,000,000 is paid to the Vendor on or before 5.00pm on 23 December 2011, as agreed by the Purchaser in your abovementioned letter;

(ii) interest of 8% per annum is chargeable on the balance of Deposit in the sum of RM6,000,000 in consideration of the further extension requested for by the Purchaser. The said interest amounting to RM40,000 is to be paid to be Vendor together with item (i) above on or before 5.00pm on 23 December 2011 and this sum is not refundable to the Purchaser under any circumstances nor taken into account towards part satisfaction of the Purchase Price for the Property nor the Assets at all material times; and

(iii) this is a final extension that will be granted to the Purchaser by the Vendor and no further request for extension of time to execute and return the agreements together with the relevant payments will be entertained.

In view of item (iii) above, in the event the Purchaser fails to, defaults in or refuses to deposit the said sum of RM1,000,000 together with the interest sum of RM40,000 under item (ii) above with the Vendor by 5.00pm 23 December 2011 or execute and return to us the agreements for the purchase of the Property and the Assets together with the payment for the balance of Deposit and other relevant documents on or before 20 January 2012, the earnest deposit sum received by the Purchaser as at the date of the Purchaser's default in complying with either of the said conditions shall be forfeited without further notice to the Purchaser as agreed liquidated damages and not by way of penalty pursuant to Clause 2.5.3 of the Information Memorandum dated 15 November 2011.

We will forward to you the amended faired agreements (without annexures) for the Purchaser's execution by 30 December 2011 provided that the Purchaser shall have deposited the said further earnest deposit sum and interest under item (ii) with the Vendor on or before by 5.00pm on 23 December 2011.

[15] This new deadline of 20 January 2012 was subsequently extended to 25 January 2012.

[16] On 25 January 2012, the plaintiff through its solicitors requested for another extension until 24 February 2012 and sent a cheque worth RM6m to the defendant's solicitors that was stated to be 'towards account of the balance deposit payable' by the plaintiff. This request was however refused and on 30 January 2012, the defendant through its solicitors terminated the sale with the SPA not executed by the plaintiff and returned the plaintiff's cheque.

[17] The defendant also wrote to inform the plaintiff that the following sums paid were forfeited, namely:

(a) RM1m ('the first earnest deposit');

(b) RM500,000 ('the second earnest deposit');

(c) RM500,000 ('the third earnest deposit');

(d) RM1m ('the fourth earnest deposit'); and

(e) the RM40,000 interest.

In total, RM3,040,000 was forfeited by the defendant.

[18] The properties were subsequently sold to a third party ('Neraca Niaga Sdn Bhd') by way of an open tender.

[19] The plaintiff initiated a civil action seeking for, among others, a declaration that termination of the sale was wrongful and invalid. In addition, the plaintiff sought for the return of its deposit money and interests of RM3,040,000 or, alternatively, RM2,040,000 less the first deposit of RM1m.

[20] The defendant counter claimed for rentals and utility charges based on the tenancy of the properties by the plaintiff.

BEFORE THE HIGH COURT

[21] After having heard the parties, the High Court dismissed the plaintiff's claim for refund of the earnest deposits forfeited and allowed the defendant's counterclaim for rentals and utility charges.

[22] In doing so, the High Court held, inter alia, that:

(On the issue of extension of time)

[13] As three extension was given for the plaintiff to execute the agreement, it was perfectly legitimate for the liquidators not to grant further extension beyond the date 25 January 2012. It is also a reasonable act on the part of the liquidators to warn the plaintiff that the date 25 January 2012 shall be the final date to execute the agreement. Also the liquidators are entitled to forfeit the RM3m as deposit and retain the RM40,000 as these sums were agreed by the plaintiff to be paid to the first defendant.

(On the issue of open tender)

[17] In view of the fact that the plaintiff had failed to meet the time line set for the execution of the agreement for the sale of the land and properties, the plaintiff's offer was rightly rejected and thereafter the liquidators called for an open tender ... Even the plaintiff was invited for this open tender as reflected in the email sent to the plaintiff on 13 February 2012 ... The plaintiff however on its own reasons, best known to them declined to participate in the open tender.

(On the issue of termination of the sale)

[20] ... the agreement between the plaintiff and the first defendant had been legally terminated by the first defendant on the simple ground that the plaintiff was unable to execute the sale and purchase agreement which was supposed to be executed on 25 January 2012 and to pay the remaining balance of the 10% deposit. There were three extension of time given to the plaintiff to execute the same and since it was not able to meet the timeline, it is only reasonable and acceptable for the first defendant to terminate the agreement that the land and properties be sold to the plaintiff. This court therefore cannot agree with the plaintiff that there was wrongful termination of the same.

(On the issue of the terms of the sale)

[21] I am also of the finding that the terms of the agreement between the plaintiff and the first defendant had been concluded and settled. It is incorrect to suggest the same were never agreed by the parties ...

(On the issue of forfeiture of earnest deposits)

[24] I also agree that the first defendant had every right to forfeit the deposits in total of RM3m which was paid by the plaintiff. The plaintiff is totally aware that the deposits were forfeited as agreed liquidated damages and not penalty as it was informed by the first defendant before the deposits were paid. I also agree that the deposits being forfeited do not contravene s 75 of the Contracts Act 1950 ...

[25] This court is of the finding the deposits paid amounting to RM3m are true deposit where the first defendant need not prove loss or damage. Therefore the above provision of the Contracts Act 1950 is not applicable. The deposits paid are earnest deposit as agreed by the parties.

(On the issue of the plaintiff's claim of damages)

[30] I am also satisfied that the plaintiff had not proven its case for damages of more RM200m for purported loss suffered as a consequences of the termination of the agreement. The plaintiff cannot simply say this is the amount of damages it has

suffered but must prove each particular details of the damages claimed. With respect this burden to prove has not been discharged by the plaintiff.

(On the first defendant's counterclaim)

[39] On the first defendant's counterclaim for rental and utilities, there is no dispute the plaintiff tried to make payments for these by forwarding Hong Leong Bank cheque No 4441653 but this cheque was dishonoured. That attempt to pay clearly indicates the plaintiff's admission that the rental and utilities are due to the first defendant. Otherwise the plaintiff would not make that effort to issue the cheque.

[40] Therefore there is on the balance of probabilities evidence to suggest the counterclaim of RM503,879.10 as rental and utilities owing by the plaintiff to the first defendant.

BEFORE THE COURT OF APPEAL

[23] On appeal, the Court of Appeal ruled that the forfeiture of the entire RM3m and RM40,000 interest was impermissible but allowed the defendant to forfeit RM1m of the earnest deposit. The Court of Appeal referred to the decisions of this court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569 and came to the view that there was no evidence to show that the impugned amount represented the damage suffered by the defendant as a result of the plaintiff's breach. Neither was it a genuine pre-estimate of loss as required under s 75 of the Contracts Act 1950.

[24] The Court of Appeal opined that when the parties entered into the agreement, it was only the RM1m that was agreed as earnest deposit. The Court of Appeal disagreed with the defendant's suggestion that the plaintiff had a liability to pay an agreed deposit of RM9m as the SPA had not been signed. The Court of Appeal decided that not only had the defendant failed to prove that it had suffered any damage, it had also failed to prove that the sum forfeited was reasonable compensation in accordance with s 75 of the Contracts Act 1950.

BEFORE THIS COURT

The defendant's position

[25] The defendant submits that:

(a) in the case of a true deposit, the words 'by way of agreed liquidated damages and not penalty' mean that the party will not claim further damages other than the deposit and that s 75 of the Contracts Act 1950

does not apply. Thus, the defendant need not prove its loss before forfeiting the earnest deposit; A

(b) in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, the Privy Council held that there was nothing 'unusual or extortionate in a 10% deposit on a contract for the sale of land'. The defendant thus contends that the sums already paid by the plaintiff are referred to as earnest deposits and amount to only 3.3% of the purchase price which is a lot less than 10% of the total purchase price; B

(c) *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569 which were both applied by the Court of Appeal allowed for the forfeiture of a 10% and a 12% deposit respectively; C

(d) *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 does not apply in the instant appeal as that case does not concern the forfeiture of a deposit; D

(e) the Court of Appeal erred in holding that the sum of RM40,000 must be refunded because that sum was not paid as deposit but as consideration for an extension of time to execute the SPA; and E

(f) the Court of Appeal was incorrect in saying that there was no breach on the plaintiff's part to pay the balance deposit of RM6m because the SPA had not been signed. It was the plaintiff that defaulted in both the payment of the RM6m and the execution of the SPA and not simply the execution of the SPA. Clause 2.6.1 had kicked in. F

The plaintiff's position G

[26] The plaintiff submits as follows:

(a) s 75 of the Contracts Act 1950 as applied in *Selva Kumar* disentitles the defendant from recovering simpliciter the sum fixed in the contract whether as penalty or liquidated damages and the defendant must prove the damage suffered unless the sum named is a genuine pre-estimate; H

(b) *Metramac* has resolved the question of what is a penalty and what is a liquidated damages clause; I

(c) the RM2m which was paid for extending the time for completing the sale does not amount to a forfeitable deposit. It is a penalty and not liquidated damages because this was to penalise the plaintiff for not being able to pay the balance deposit sum on time;

A (d) the burden is on the defendant to prove its loss which was not done; and

(e) in the SPA there is no place for the defendant to impose any form of interest on the balance deposit sum and the RM40,000 interest imposed by the defendant amounts to unjust enrichment.

B DECISION OF THIS COURT

[27] Based on the questions posed and the submissions of learned counsel for the parties the basic disputes are, firstly, on the legal position of the additional deposits paid by the plaintiff upon its failure to execute the SPA within the C given time and secondly, due to the delay, the payment of interest of 8%pa chargeable on the outstanding balance of deposit which was then RM6m. And it is pertinent to note that in this case a damages clause (or sometimes known as penalty clause) is not in issue, but the primary focus is on the treatment of D deposits vis a vis s 75 of the Contracts Act 1950 ('the Act').

[28] In considering the true legal position of the additional deposits and the interest paid in this case, these salient facts should be taken into account, namely:

E (a) the total deposit payable under the SPA is RM9m;

(b) the payment of RM1m as the earnest deposit is not in issue;

(c) the additional deposits paid are clearly described as further additional earnest deposits;

F (d) the plaintiff did not protest when making those further additional earnest deposits as well as the interest charged;

(e) the further additional earnest deposits paid would be taken as part payment of the total deposit payable upon the signing of the SPA; and

G (f) the SPA was never executed. The relationship of the plaintiff and the defendant was not premised on an agreement containing the usual specific damages clause.

H **[29]** Despite the payments made being described as further additional earnest deposits the plaintiff avers that they are not true deposits but penalties and caught by s 75 of the Act which encapsulates the common law principle against damages clause in a contract. Meanwhile we note that there is no statutory definition for a true deposit under the Act.

I **[30]** Hence, in answering the questions posed it is therefore necessary for us to consider the principles of law applicable to forfeiture of deposits and on damages clause bearing in mind s 75 of the Act. The question is whether s 75 is equally applicable to forfeiture of deposits or once it is found to be a deposit

the section has no application? The High Court judge preferred the latter view and answered it in the affirmative. But as alluded to above the term 'deposit' is not defined in the Act. From the judgment of the learned judge it is quite obvious that the label played a major role in the finding. The payments were held to be deposits since it was so stated.

[31] Section 75 of the Act provides that:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[32] In considering the scope of s 75 vis a vis forfeiture of deposits it should first be understood that there is a distinction between part-payments of the contract price and deposits. The general principle is that if there is a breach of contract any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer (see *Dies v British and International Mining and Finance Corpn Ltd* [1939] 1 KB 724 and illustration (r) of s 74 of the Act).

[33] But deposit paid which is not merely part payment but also as a guarantee of performance is generally not recoverable. In *Howe v Smith* (1884) 27 Ch D 89, the court in interpreting the words 'as a deposit and in part payment of the purchase money' observed that a deposit acts as a guarantee of performance by the purchaser and also goes towards part payment of the purchase price. Hence, if a contract is completed the deposit is applied towards payment of the purchase price, and if the contract is not completed the deposit is liable to forfeiture (see *Lewison, K, The Interpretation of Contracts*, 5th Ed, (London: Sweet & Maxwell, 2011) at p 796). This is the position under English law.

[34] The Indian position also regards earnest money as not merely a part-payment but also an earnest to bind a bargain (see *(Kunwar) Chiranjit Singh v Har Swarup* AIR 1926 PC 1; *Satish Batra v Sudhir Rawal* (2013) 1 SCC 345).

[35] In Malaysia, in the case of *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711, our then Supreme Court observed at p 713 that:

> A deposit is not merely a part payment but is also an 'earnest' money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract — see *Howe v Smith* (1884) 27 Ch D 89 101. *The*

deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business — per Lord MacNaghten in Soper v Arnold (1889) 14 App Cas 429.

(See also *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 (FC) at pp 595–596 and 597).

[36] Whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of the case, and the usual principles of interpretation apply (see *Davies, PJC Smith's The Law of Contract* 2nd Ed, (UK: Oxford University Press, 2018) at p 435). Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part payment, it is a deposit. The next question is whether once determined as such a deposit is forfeitable per se or is it still subject to the principles of law applicable to damages clause? If it is the latter, what are the principles of law applicable to a damages clause?

[37] Under the English common law, 'a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach': per Lord Browne-Wilkinson in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at pp 578–579.

[38] Earlier decisions of the English and Indian courts seemed to indicate that the law of forfeiture of deposits and the law of penalties were mutually exclusive in the sense that once a payment is found to be a deposit it is forfeitable without the need to resort to the principles relating to damages clause (see *WJ Younie and Ors v Tulsiram Jankiram and Ors* AIR 1942 Cal 382; *Jagdishpur Metal Industries and Ors v Vijoy Oil Industries Ltd* AIR 1959 Pat 176; *Hinton v Sparkes* (1868) LR 3 CP 161; *Lock v Bell* [1931] 1 Ch 35).

[39] A similar approach was adopted in this country. Lord Hailsham in the Privy Council case of *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at p 94 maintained that while the law on damages clause did not apply to forfeiture of deposits, the amount of deposit must be reasonable when it was said that 'the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage'.

[40] The proposition that a deposit must be reasonable as propounded in *Linggi Plantations* was affirmed in *Workers Trust*. In stressing the critical point that a deposit must be a reasonable amount, it was held in the latter case that

when a deposit is not a 'true' deposit by way of earnest (in that the deposit is not a reasonable amount and there is a failure to show any 'special circumstances' which could justify such deposit), the provision for its forfeiture is a plain penalty, 'from which the court will give relief by ordering repayment of the sum so paid, less any damage actually proved to have been suffered as a result of non-completion'.

[41] But while the decision in *Workers Trust* could be understood to support the mutually exclusive approach, it has also been said to have begun the process of bringing the law relating to deposits closer to the law relating to damages clause. And that can be inferred from the earlier cited opinion of Lord Browne-Wilkinson (see *UK Housing Alliance (North West) Ltd v Francis* [2010] 3 All ER 519) (see also *McKendrick, E, Contract Law: Text, Cases, and Materials*, (London: Oxford University Press, 2012) at p 922).

[42] Indeed earlier Indian authorities had perpetuated the idea that s 74 of the Indian Contract Act 1872 did not apply to a deposit for due performance of a contract which is stipulated to be forfeited upon breach (see *Natesa Aiyar And Anr vs Appavu Padayachi And Anr* (1915) ILR 38 Mad 178; *Singer Manufacturing Company v Raja Prosad* (1909) ILR 36 Cal 960; *Manian Patter v Madras Railway Company* (1906) ILR 19 Mad 188). However, such view had been subsequently dispelled by the Indian Supreme Court in *Maula Bux v Union of India* (1970) 2 MLJ 61 (SC) where it was held at pp 64–65 that:

> There is authority, no doubt coloured by the view which was taken in English cases, that section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach: *Natesa Aiyar v Appavu Padayachi; Singer Manufacturing Company v Raja Prosad*; *Manian Patter v The Madras Railway Company*. But this view is no longer good law in view of the judgment of this Court in *Fateh Chand*'s case. This Court observed at page 526:
>
> > Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty. The measure of damages in the case of breach of a stipulation by way of penalty is by section 74 reasonable compensation not exceeding the penalty stipulated for.

The court also observed:

> It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression 'the contract contains any other stipulation by way of penalty' comprehensively applies to every covenant involving a penalty whether it is for payment on breach of

contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by section 74. In all cases therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture and that, there is no ground for holding that the expression 'contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.

[43] In *Kailash Nath Associates v Delhi Development Authority* (2015) 4 SCC 136 the Indian Supreme Court reiterated that the Indian s 74 applied to deposits, reasoning at para [40] that: 'The law laid down by a Bench of 5 Judges in *Fateh Chand*'s case is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in Fateh Chand's case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74'.

[44] The United Kingdom Supreme Court has also affirmed the one rule instead of the mutually exclusive approach. In *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, the Supreme Court suggested that '(i) both the law on penalties and the law on relief against forfeiture may be applied to the same clause albeit that the relationship between the two is 'not entirely easy'; and (ii) a case like *Workers Trust and Merchant Bank Ltd* may be best rationalised as applying the reformulated law on penalties, that is, looking at legitimate interest and proportionality rather than the law on relief against forfeiture (see *Burrows, A, A Restatement of the English Law of Contract*, (London: Oxford University Press, 2016) at p 41).

[45] As such, the courts in the United Kingdom and India have held that presently the principles of law on damages clause are equally applicable in relation to forfeiture of deposits instead of the mutually exclusive approach. We are therefore inclined to hold that the time has come for our courts to adopt a similar approach. After all s 75 of the Act and s 74 of the Indian Contract Act 1872 are in pari materia.

[46] Having expressed our inclination as above, it is therefore relevant to revisit the scope of s 75 of the Act bearing in mind the recent developments relating to the principles of law on damages clause in the United Kingdom.

[47] We begin by stating that the law of contract performs three pivotal functions. Firstly, it enables parties to create legally binding obligations with each other. Secondly, it provides a means as to the enforcement of these obligations. Underlying these two functions is the notion of freedom of contract. The regulation of freedom of contract is the third function of the law of contract. This is achieved by providing for rules when obligations undertaken by contracting parties are ignored, or when the law imposes certain obligations on the contracting parties (see *Scottish Law Commission,Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses*, *March 2018*, paras [1.9]–[1.10]). It is the latter context in which s 75 of the Act operates.

[48] In *Wallis v Smith* (1882) 21 Ch D 243, Jessel MR who disapproved of judicial meddling with the stipulations of parties recognised at p 266 that:

> I think it necessary to say so much because I have always thought, and still think, that it is of the utmost importance as regards contracts between adults — persons not under disability, and at arm's length — that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. *I am perfectly well aware* that there are exceptions, but they are exceptions of a *legislative character*. (Emphasis added.)

[49] In *Cavendish* Lord Neuberger, Lord Sumption and Lord Carnwarth acknowledged that the penalty rule was an encroachment upon freedom of contract that should be regulated by legislative instead of judicial means. Their Lordships astutely pointed out that:

> There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. *The penalty rule regulates only the* remedi es available for br each of a party's primary *obligations, not the primary obligations themselves*. (Emphasis added.)

[50] Similarly, Sundara Ayyar J in the Indian case of *A Muthu Krishna Iyer v Sankaralingam Pillai* (1913) ILR 36 MAD 229 elucidated at pp 265–266 that:

> What then is the real principle underlying the court's interference with the contract between parties as to a payment to be made by way of damages? In my opinion it can be no other than this — *the doctrine that the court will* carry out all contracts

> between parties is confined to *the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken … and the courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness* … but the construction of the contract should not proceed on the court's view as to the reasonableness or otherwise of what in fact is a secondary contract. *If the secondary contract* is a just and reasonable one, the court of course has *the power to award the damages secured by it as reasonable in the circumstances. Such award need not and ought not to be made to depend on the construction of the contract itself as an alternative one. There is, moreover in my opinion, no reason to regret the well-established rule that the court is not bound to enforce the performance of such secondary contr acts; … What is there improper then in the court reserving to itself the discretion to enforce the performance of a secondary contract? The propriety of doing so was, I believe, what really led to the Courts of Equity in England assuming jurisdiction not to award more than a reasonable amount as damages, notwithstanding an agreement between the parties themselves assessing the amount*. (Emphasis added.)

[51] Clearly, a court of law has always maintained a supervisory jurisdiction to relieve against a damages clause which is so unconscionable or oppressive (see *Philips (Hong Kong) Ltd v The Attorney General of Hong Kong* (1993) 61 BLR 49; [1993] UKPC 3 at para [57]) (see also: *Chen-Wishart, M, Contract Law*, 5th Ed, (UK: Oxford University Press, 2015), Chapter 14.3, pp 585–586). In exercising this supervisory jurisdiction, it is unlikely that a breach of contract can escape judicial scrutiny under the guise of creative or clever drafting of the damages clause in another way (see *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6; [2010] 1 AC 696 at para [83]). The courts have come to acquire a monopolistic control over the use of such damages clause (see *Simpson, AWB, A History of the Common Law of Contract: The Rise of the Action of Assumpsit,* Vol 1, (Oxford: Clarendon Press, 1996), pp 118–125) and have often revealed little hesitation in cutting through such shams and controlling the disguised damages clause (see *Collins, H, The Law of Contract*, 4th Ed, (UK: LexisNexis Butterworths, 2003), pp 373–375).

[52] In any event, as enunciated by Lord Neuberger, Lord Sumption and Lord Carnwarth in *Cavendish* at para [15], 'the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it'. This echoes the earlier sentiment of the Privy Council in *Linggi Plantations* where Lord Hailsham recognised at p 94 that:

> It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment.

[53] Thus, in our case, the legislative mechanism introduced by s 75 of the Act must be considered a necessary curtailment of absolute freedom of contract, designed to check against potential abuse by a party at another's expense.

[54] In passing, without expressing a definitive opinion on the point, in view of the entrenched monopolistic jurisdiction of the courts dealing with an agreed damages clause, and the clear legislative intent to address the mischief aforesaid, it may not be too farfetched to suggest that notwithstanding the doctrine of freedom of contract where arguably parties may be free to contract away from default contract rules, they may not be at liberty to contract out from the provisions of s 75 (see *Morgan, J, Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law*, (UK: Cambridge University Press, 2013) , Chapter 6, at p 91) (see also *Morgan, J, Great Debates in Contract Law*, (UK: Palgrave Macmillan, 2012), Chapter 8, pp 222–224). It would plainly be contrary to public policy to allow a mischief sought to be remedied by a statutory provision to be defeated on the basis of freedom of contract, in much the same way as allowing the grotesque quality of Shylock's pound of flesh (see *Carter, JW and Elisabeth Peden, 'A Good Faith Perspective on Liquidated Damages', Justifying Private Law Remedies*, Ed, Charles EF Rickett, (Bloomsbury Publishing, 2008), Chapter 7).

[55] Reverting to the issue at hand, under English common law the traditional formulation of the principles of law applicable to damages clause was laid down in the case of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 in which the distinction between a liquidated damages clause and a penalty was drawn. The rule was that a liquidated damages clause was actionable if it constituted a genuine pre-estimation of the damage that may flow from a breach of contract and unenforceable if it was a penalty in that the sum paid or payable by the contract-breaker was extravagant and unconscionable in amount in comparison with the greatest conceivable losses that could have flown from the breach.

[56] However, quite recently this traditional formulation was restated by the United Kingdom Supreme Court in the case of *Cavendish*. The dichotomy between genuine pre-estimated damages and penalty was abolished since the distinction was held to be unhelpful and a damages clause could be neither a genuine pre-estimate nor a penalty, or it could be both.

[57] Thus, under English law, the current approach is that in determining whether a damages clause in a contract amounts to a penalty, courts must first consider whether any 'legitimate commercial interest' in performance extending beyond the prospect of pecuniary compensation flowing from the breach is served or protected by a damages clause and then evaluate whether the

provision made for the interest is proportionate to the interest identified. And the overall common denominators that must be further identified by the courts are whether the damages clause:

(a) is a secondary obligation and not a primary obligation which would be enforceable per se;

(b) which imposes a detriment on the contract-breaker; and

(c) which is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

[58] The restatement of the principles of law on damages clause represents a clear shift in judicial attitude where courts are reluctant to interfere with parties' freedom of contract, especially if the contracting parties have comparable bargaining power and are properly advised. Hence, in a sense, the reformulation in *Cavendish* gives more legal certainty to the operation of a damages clause as a permissible risk allocation tool. It also signifies judicial recognition of the notion of broader commercial justifiability. Loss or damage is no longer confined to pecuniary compensation. Applying the new approach or test it is therefore, as alluded to earlier, only in situations when the sum stipulated in a damages clause is unconscionably high and exorbitant by reference to the innocent party's legitimate interest in the performance of the contract that such a clause is struck down.

[59] It should be noted that the new English approach or test also applies to both commercial and consumer contracts and even in a contract where a damages clause requires transfer of assets (rather than money), withholding of a sum of money, and forfeiture of deposits in the event of a breach. Previously the law applied only to the classic case where a damages clause requires payment of a sum of money.

[60] Now, reverting to the local position, s 75 of the Act has done away with the distinction between liquidated damages and penalties (*Linggi Plantations* at p 92) as previously understood under English law (see *Visu Sinnadurai, Sinnadurai Law of Contract*, 4th Ed, (Malaysia: LexisNexis, 2011) at p 1117 quoting the Indian Supreme Court decision in *Fateh Chand v Balkishan Das* 1963 AIR 1405).

[61] And presently the local position has always been that an innocent party in a contract that has been breached, cannot recover simpliciter the sum fixed in a damages clause whether as penalty or liquidated damages. He must prove the actual damage he has suffered unless his case falls under the limited situation where it is difficult to assess actual damage or loss (see *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, approving the Privy Council decision in *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179).

[62] As such the courts have always insisted that actual damage or reasonable compensation must be proved in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341 (see *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 at pp 459–460). A

[63] Accordingly, the effect is that no provision in a contract by way of liquidated damages in this country is recoverable in a similar manner as it would have been under the pre-*Cavendish* English law since in every case the court has to be satisfied that the sum payable is reasonable. B

[64] Having noted the foregoing, does this then mean that for every case where the innocent party seeks to enforce a clause governing the consequences of breach of a primary obligation, it invariably has to prove its actual loss or damage? *Selva Kumar* and *Johor Coastal* seem to answer in the affirmative, unless the case falls under the limited situation where it is difficult to assess actual damage or loss. C D

[65] With respect and for reasons we shall set out below, we are of the view that there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause. *Selva Kumar* and *Johor Coastal* should not be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point. E F

[66] As for our reasons we begin by saying that in view of the legislative history of s 75 of the Act which need not be elaborated in this judgment, we are of the considered opinion that there is nothing objectionable in holding that the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish* are relevant in deciding what amounts to 'reasonable compensation' as stipulated in s 75 of the Act. Ultimately, the central feature of both the *Cavendish* case and s 75 of the Act is the notion of reasonableness. Indeed, the *ParkingEye Ltd v Beavis* [2015] UKSC 67 judgment is replete with instances where the United Kingdom Supreme Court conflated 'proportionality' with 'reasonableness' (see: *ParkingEye* at paras [98], [100], [108], [113] and [193]). G H

[67] *ParkingEye* is also a good illustration of how the court may uphold an impugned clause in the absence of actual loss or damage by applying the concepts of legitimate interest and proportionality. This case concerned the imposition of a £85 fee by the operator of a car park for visitors who overstayed the two-hour limit. In *ParkingEye* it was held that the fact that the appellant suffered no loss by the motorists' overstaying at the car park (since it had no proprietary interest) did not render the contractual provision penal. The I

United Kingdom Supreme Court felt that *ParkingEye* had a legitimate interest to protect. It provided a valuable service in maximising the use of car park spaces which benefited the landowner, retailers operating on site, and their customers, and this service was funded by charges paid by the car park overstayers. Considerable weight was placed on the fact that the scheme was transparent because signs regarding the charge for overstaying were prominently displayed throughout the premises. A majority of the Supreme Court also thought that the £85 was below the maximum amount prescribed by the British Parking Association.

[68] Consequently, regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation. This means that in a straightforward case, reasonable compensation can be deduced by comparing the *amount* that would be payable on breach with the *loss* that might be sustained if indeed the breach occurred. (Emphasis added.) Thus, to derive reasonable compensation there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.

[69] Notwithstanding the foregoing, it must not be overlooked that s 75 of the Act provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount.

[70] We turn now to the issue on burden of proof. The initial onus lies on the party seeking to enforce a clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

[71] If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages

clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.

[72] It bears repeating that the court should be slow to refuse to give effect to a damages clause for contracts which are the result of thorough negotiations made at arm's length between parties who have been properly advised. The court ought to be alive to a defaulting promisor's natural inclination to raise 'unlikely illustrations' in argument to show substantial discrepancies between the sum due under the damages clause and the loss that might be sustained in the unlikely situations proposed by the promisor (see *Philips Hong Kong Ltd* at p 59) so as to avoid its liability to make compensation pursuant to that clause see *Tham, Chee Ho, 'Non-compensatory Remedies', The Law of Contract in Singapore*, Ed, Andrew Phang Boon Leong, (Singapore: Academy Publishing, 2012), pp 1645–1862 at p 1654).

[73] At any rate, to insist that the innocent party bears the burden of proof to show that an impugned clause is not excessive would undermine the purpose of having a damages clause in a contract, which is to promote business efficacy and minimise litigation between the parties (see: *Scottish Law Commission, Discussion Paper on Penalty Clauses* (Discussion Paper No 103), December 1997, paras [5.30]–[5.40]).

[74] In summary and for convenience, the principles that may be distilled from hereinabove are these:

(a) if there is a breach of contract, any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer. But a deposit paid which is not merely part payment but also as a guarantee of performance is generally not recoverable;

(b) whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of a case, and the usual principles of interpretation apply. Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part payment, it is a deposit;

(c) a deposit is subject to s 75 of the Act;

(d) in determining what amounts to 'reasonable compensation' under s 75 of the Act, the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish* are relevant;

(e) a sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in

comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party;

(f) s 75 of the Act allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point;

(g) the initial onus lies on the party seeking to enforce a damages clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any; and

(h) if there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.

[75] Having addressed the relevant principles of law above, we now return to this appeal. But before going into further detail we would state that in addition to the facts highlighted above the following clauses in the information memorandum are also relevant, namely:

(a) cl 2.5.3 which states:

> Where the Purchaser(s) fails to sign the SPA pursuant to section 2.6, the Liquidators shall reserve the rights to cancel the sale and absolutely forfeit the ED paid pursuant to Section 2.5.1 as agreed liquidated damages and not by way of penalty.; and

(b) cl 2.6.1 which states:

> The SPA must be signed within thirty (30) days of the Liquidators' notification to the Purchaser(s) that his/her respective offer has been accepted unless otherwise extended by Liquidators at their absolute discretions. A deposit of 10% of the Offer Price ('the Deposit') is payable upon execution of the SPA. In this regard, the ED pursuant to section 2.5 shall be applied towards the payment of the Deposit.

[76] It is also essential to note that there is no formal contract finalised between the parties setting out their rights and obligations with regard to the

sale of the properties in full. But it is our considered opinion that the relevant bargain between them can be discerned from the written exchanges made when the plaintiff was requesting for more time to execute the SPA. The correspondence between the parties disclosed that the additional sums totalling RM2.04m were paid by the plaintiff in return for the defendant extending the time to execute the SPA. And the communications between the parties consistently indicated that the RM2m would also constitute part payment of the earnest deposit which include a guarantee of performance in executing the SPA.

[77] Further, we observe that when the parties were negotiating over the extension of time for the completion of the SPA, they invariably characterised the impugned payments as 'earnest deposit' (see Tabs 7, 8, 9, 10, 11, 13, 14, 18 and 19 of the amended core bundle; the answers to questions 51 and 54 of PW1's witness statement, record of appeal, Vol 2, pp 96–97; and the answers to questions 118, 124 and 125 of PW1's cross-examination, record of appeal, Vol 4, pp 229–230). In fact, it was the plaintiff's suggestion to top up the earnest deposit when it wrote to the defendant for the second and third extensions (see Tabs 13 and 18 of the amended core bundle).

[78] Moreover, we note that when the plaintiff wrote to the defendant to ask for the second, third, and final extension of time, it had done so on the understanding that the payments of additional earnest deposit would go towards reducing the outstanding earnest deposit amount (see Tabs 13, 17 and p 68 of the amended core bundle). Evidently therefore the plaintiff had envisaged that the additional earnest deposit sums were to be treated as part of the earnest deposit and as understood hereinabove.

[79] The parties were also well aware that should there be default in executing the SPA, the plaintiff's earnest deposit payments would be forfeited as 'agreed liquidated damages'. On every occasion where an extension of time was granted to the plaintiff, the defendant had repeatedly warned the former that failure in executing the SPA would result in the forfeiture of the amounts paid as 'agreed liquidated damages and not by way of penalty' (see Tabs 11, 14, and 19 of the amended core bundle).

[80] It should also be noted that both parties had the benefit of legal representation and the plaintiff made no objection in relation to the imposition of the aforementioned conditions by the defendant.

[81] Accordingly, in our view the conduct of the plaintiff is strong evidence that it had agreed that the additional payments of RM2m would form part of the earnest deposit guaranteeing the plaintiff's performance in the execution of the SPA and which would eventually be counted towards payment of the

earnest deposit. As such, we find that the additional payments bear the characteristics of a deposit. In view of what we have stated above that deposits are subject to the same test of reasonableness under the law applicable to damages clause, there is a need for the additional payments to be examined through the prism of s 75 of the Act.

[82] In our opinion, prior to the aborted sale both parties had entered into a series of agreements whereby each time the defendant consented to an extension of time it was conditional upon the plaintiff paying up further earnest deposit sums as guarantee too for the performance in executing the SPA. The parties had covenanted that the plaintiff be given more time to execute the SPA in consideration for it making certain additional payments. We are therefore of the considered view that when the three extensions of time were granted, the primary obligation on the plaintiff's part was to ensure that the SPA was completed by the new deadline. Failure by the plaintiff to perform this primary obligation would then result in it having to fulfil its secondary obligation to forfeit the agreed sums.

[83] Further, in a case such as the present where a company has gone into liquidation, the liquidator has a duty to realise the assets of the insolvent company at the best possible price to maximise the amount available to the creditors of the company.

Consequently, it would not be unreasonable to require some form of guarantee from potential bidders to show that they mean business (see *Amble Assets LLP (in administration) and another v Longbenton Foods Ltd (in administration)* [2011] EWHC 1943 (Ch) at paras [32], [47] and [59]). In addition, the liquidators for the defendant had a duty to ensure that the assets of the company were realised without needlessly protracting the liquidation process.

[84] Due to the plaintiff's failure in completing the execution of the SPA, the matter had dragged on for nearly three months before the defendant terminated the sale. It is obvious to us that the delay in the completion of the sale and its subsequent cancellation could not be said to have no financial impact on the defendant. Besides the depreciation in value of its moveable assets, it would have had to incur continuing monetary expenditure in the form of liquidators' fees. When the defendant discontinued the tender process after accepting the plaintiff's offer, it was also deprived of an opportunity to complete the sale with another party.

[85] On the facts, the defendant had in November 2011 received and declined a proposal by UTeM Holdings to purchase the properties for RM135m on the basis that it had already finalised the SPA with the plaintiff (see the answers to questions 30–32 of the witness statement of DW2, record of appeal, Vol 6, pp 426–428, and record of appeal, Vol 13, pp 1250–1252).

The court must not be oblivious to commercial realities which are integral to a thriving business sector. An innocent party's loss of opportunity is one of the many myriad factors that the court may take into account in assessing whether it has a legitimate and proportionate interest to be protected.

[86] In our view, the defendant's deprivation of a chance to enter into negotiations with a third party in addition to its goal of securing the execution of the SPA and avoiding delay in completion, are all legitimate interests which the forfeited payments were intended to guard against. In short, the defendant had a legitimate interest in ensuring that the bargain between itself and the plaintiff came into fruition in a timely manner.

[87] Having established that the defendant had legitimate interests to safeguard, we now move on to consider whether the additional RM2m was disproportionate. In our view, the additional RM2m paid is not too large a figure when compared against the total purchase price of the properties, that is, RM90m. Combined with the initial earnest deposit sum of RM1m (which the plaintiff is not contesting), the additional RM2m represents only 3.33% of the purchase price for the properties.

[88] In light of the foregoing, the onus now lies on the plaintiff to show that the forfeiture of the additional RM2m was excessive. From the evidence, the plaintiff had not adduced any proof showing that the forfeited payments were exorbitant or unreasonable. It only insisted that it should be entitled to a refund because the defendant had not proved actual loss or damage. Since there was no real argument from the plaintiff on the reasonableness or otherwise of the forfeiture clause, we hold that it has not discharged its burden of proof. Consequently, we rule that the forfeiture of the additional RM2m amounts to reasonable compensation.

[89] With respect, we find that in coming to its decision the Court of Appeal failed to appreciate the facts and evidence adduced in this case. Such failure is indicated from its comment that the figures for the additional payments made were plucked from the air. In fact the parties knew well and agreed on the purpose of the additional payments, namely, as a guarantee for the performance by the plaintiff to execute the SPA and upon its execution they would be part payments for the total earnest deposit of RM9m. As for the High Court decision we find it was too simplistic an approach and gave the labelling of the sums paid too much weight without proper appreciation of the relevant principles of law applicable.

[90] We shall now deal with the RM40,000 sum representing accrued interest that was imposed by the defendant for the final extension of time. The RM40,000 interest was not a figure arbitrarily imposed according to the

defendant's whims and fancies. The defendant had in its reply to the plaintiff dated 22 November 2011 explained that it was arrived at by charging interest of 8%pa on the balance deposit of RM6m and at all material times it was not to constitute part payment of the purchase price for the properties (see: Tab 19, amended core bundle). In fact the SPA was not yet executed at the material time. As such the issue of any of the terms therein coming into force did not arise. The payment of the RM40,000 was agreed upon by the parties as interest charged for the delay in the receipt of the balance of the earnest deposit from the plaintiff.

[91] Indeed it is clear from the defendant's reply to the plaintiff's request for a third extension dated 22 December 2011 and the plaintiff's act of paying up the additional RM1.04m, that the parties had agreed upon and intended for the RM40,000 interest to be non-refundable (see Tab 19, amended core bundle). Since the RM40,000 was not refundable irrespective of whether the sale went through, it was payable regardless of any breach and thus fell outside the scope of s 75 of the Act.

[92] For the reasons given above, we would therefore answer the first leave question in the affirmative in that in a sale and purchase of land where the terms and conditions have been agreed upon and a date fixed for execution, any additional deposit paid for the extension of time for completion is subject to forfeiture if it is consistent with s 75 of the Act, that is, if it is a reasonable amount. *As such, the total sum of RM2m being the* additional earnest deposits paid by the plaintiff is therefore *forfeitable by the defendant*. (Emphasis added.)

[93] As for the second leave question, our answer is in the negative for the reasons given above. *Hence, the payment of* RM40,000 interest is not refundable to the plaintiff. (Emphasis added.)

[94] We therefore allow this appeal with costs. The decision of the Court of Appeal is hereby set aside. We reinstate the order of the High Court but for different reasons.

Appeal allowed with costs.

Reported by Ashok Kumar